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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 408

MATHIAS WALKER, JR., JOHN E. MOORE, JR., RALPH VAN CURE, A MINOR BY MARGUERITE VAN CURE, HIS MOTHER AND NEXT FRIEND,

Petitioners,

vs.

FOREST PRESERVE DISTRICT OF COOK COUNTY, ILLINOIS,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners seek this Court's review of a judgment of the Supreme Court of Illinois affirming the Superior Court of Cook County's dismissal of plaintiffs' cases on the ground of governmental immunity.

QUESTION PRESENTED.

It is respondent's position that the "Questions Presented" by the petition do not accurately represent the constitutional question, if any, presented to this Court by the decision of the Illinois Supreme Court in affirming dismissal of Petitioners' Complaints under the doctrine of governmental immunity.

It is Respondent's contention that the questions presented are:

1. Is it unconstitutional for the Supreme Court of a State to overrule the common law doctrine of governmental immunity in an action brought against a School District and in a subsequent case against a Forest Preserve District deny a recovery on the ground of sovereign immunity?

2. Can a State Supreme Court constitutionally abolish the common law doctrine of governmental immunity and apply the announced new rule to parties represented in the proceedings leading to the overruling decision and at the same time make prospective its application to all other claimants?

STATEMENT OF THE CASE.

Plaintiffs' statement of the case is correct as far as it relates to the dates of the injuries sustained by the respective plaintiffs and that they occurred at pools maintained by the Forest Preserve District. Thereafter some inaccuracies appear. Respondent states that the material facts are as follows:

1. Separate Complaints were filed by the Petitioners; by Walker in the Superior Court of Cook County on November 7, 1956, amended August 7, 1957, and by Moore and Van Cure in the Circuit Court of Cook County on June 1, 1959.

2. All three Complaints were answered and thereafter the respondent, Forest Preserve District, was given leave to withdraw its Answer in each case and to file identical motions to dismiss each Complaint. Subsequently on motion of all plaintiffs the three cases were consolidated because there was presented a common question of law, i.e., the Forest Preserve District's immunity from tort liability.

3. Upon hearing the trial court dismissed the Complaints on September 27, 1961 (Abst. 63, 64).

4. On March 25, 1963, the Supreme Court of Illinois affirmed the Order of Dismissal and on May 29, 1963 denied rehearing (Petition, Appendix A, 1a).

5. Plaintiffs' constitutional position advanced in the Supreme Court of Illinois was that the trial court had predicated its decision on the statute (Petition, Appendix B, 6a) and referred to by Petitioners in their Petition as the "Immunity" statute (Petition, p. 8), and hereinafter referred to by Respondent by the same designation; that said statute was not applicable to plaintiffs' cases and if applicable, the statute was unconstitutional under both State and Federal Constitutions.

Plaintiffs' claims were predicated upon a theory of a so-called "nuisance exception" to the doctrine of governmental tort immunity and in addition that plaintiffs possessed a vested right to a cause of action against the Forest Preserve District which was allegedly destroyed by the retroactive language of the statute.

6. Plaintiffs admit that at the time of the injuries sustained by them, governmental bodies such as the Forest Preserve District were under the Common Law Rule in Illinois, immune from tort liability (Petition, p. 3).

7. Plaintiffs' position adopted in this court and raised for the first time in this action is that the State Supreme Court's original *Molitor* opinion, *Molitor* v. *Kaneland Community Dist. No. 302*, 18 Ill. 2d 11 (1959) May 22, 1959, abolishing the doctrine of governmental immunity from tort liability created in plaintiff a right which was unaffected by the court's final decision in that case rendered December 16, 1959, upon rehearing and making the overruling of the doctrine of governmental immunity prospective only, except as to the plaintiff in that case and that

the Court subsequently including in that exception the other children injured in the same occurrence while refusing to extend the exception to the plaintiffs, constitutes a violation of due process and equal protection. Plaintiffs further contend that the alleged vested right was infringed by the so-called "Immunity" statute which became effective July 22, 1959, after the first *Molitor* opinion, and before the final *Molitor* opinion rendered on rehearing.

REASONS FOR DENIAL OF THE WRIT

IT IS RESPONDENT'S POSITION THAT THE PETITION SHOULD BE DENIED FOR BOTH JURISDICTIONAL AND SUBSTANTIVE REASONS.

I.

Jurisdictional Grounds.

This Court has repeatedly stated that it will not exercise its jurisdiction to review a final decision of a State Supreme Court unless it affirmatively appears (1) that there was no adequate State ground to support the decision, *Durley* v. *Mayo*, 351 U. S. 277, 281 (1956); (2) that the asserted constitutional question was properly presented, *Terrance* v. *Pennsylvania*, 287 U. S. 660, 53 S. Ct. 222 (1932); (3) that a decision on constitutional questions was necessary for a determination of the case, *Terrance* v. *Pennsylvania*, 287 U. S. 660, 53 S. Ct. 222 (1932). (4) Nor will this Court review such a decision unless the intervention of this Court is necessary in the performance of its constitutional duty, *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 569, 67 S. Ct. 1409 (1947).

1. There Are Adequate State Grounds to Support the Decision.

It is clear under this Court's decision in *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, that the Supreme Court of Illinois could have made its decision in the case of *Thomas Molitor* prospective only and have denied thereby to all plaintiffs whose claims arose prior to the effective date of that decision the benefit of the effect of that decision without infringing upon any federal con-

stitutional rights. There is also ample precedent for prospective overruling with the new rule applied to the case in which decision is made. *Bowling* v. *Overholsey*, 100 U. S. App. D. C. 247, 243 F. 2d 825; *Shoultakon* v. *District of Columbia*, 98 U. S. App. D. C. 371, 236 F. 2d 666, 60 A.L.R. 2d 686; *Durham* v. *United States*, 94 U. S. App. D. C. 228, 214 F. 2d 826, 45 A. L. R. 2d 1430.

When it came to the Supreme Court's attention that the appeal prosecuted on behalf of *Thomas Molitor* had been regarded by the court below as well as the parties to all actions arising out of that particular occurrence as representative of the rights of all the parties the Court included them within its application of the rule abolishing governmental immunity.

> "To expedite review and minimize expense, the trial court suggested 'going up on a short record at an early date, on the sole question of whether the Complaint states a good cause of action,' and that this would provide 'the basis for determining the future course of the parties to this case as well as other claimants.' The count on behalf of *Thomas Molitor*, whose name was selected arbitrarily for the appeal, was dismissed." *Norma Molitor, et al.* v. *Kankakee Community Dist. No. 302*, 24 Ill. 2d 467, 468 (March, 1962).

This action on the part of the Supreme Court of Illinois was reasonable in the light of the foregoing authorities and therefore was justified on State grounds.

2. The Alleged Constitutional Violation Based on Molitor Decision Was Not Presented in the State Court.

That portion of plaintiffs' Petition predicated upon the Illinois Supreme Court's treatment of the *Molitor* problem as affecting plaintiffs' constitutional rights was not presented to that Court in either Petitioners' Brief, Oral Argument or Petition for Rehearing though both *Molitor*

decisions had been rendered one year previous. It was consequently not presented to the Supreme Court of Illinois for determination, Ill. Sup. Ct. Rules, Smith Hurd, 1961, Ill. Rev. Stat. Ch. 110 Sec. 101.39, 101.44, and therefore should not be entertained by this court.

3 A Ruling on the Constitutional Question Raised in Reference to the "Immunity" Statute Was Not Necessary for a Determination of the Case.

The application of the "Immunity" Statute to Petitioners' cases was not necessary to a determination of the Petitioners' claims since their claims would be precluded by the common law doctrine of sovereign immunity. Petitioners are not in the exact class of the children injured in the Molitor school bus. Their claims were against the School District for alleged negligence in the operation of a School District bus and those opinions apply to the liability of a School District. Petitioners' claims are against a Forest Preserve District, a governmental corporation, performing entirely different governmental functions. There is no case in the State of Illinois in which the doctrine of governmental immunity in tort liability has been denied or overruled in respect to a Forest Preserve District. By virtue of language of the Supreme Court of Illinois, in *Peters v. Bellinger*, 19 Ill. 2d 365, the Supreme Court might consistently hold that the rule of immunity respecting Forest Preserve District liability was unaffected by the *Molitor* decision. In *Peters v. Bellinger, supra*, the Court said:

> "Those municipal and quasi-municipal corporations which have enjoyed immunity in the past continue to enjoy it until December 16, 1959. Recovery may be made in causes of action arising thereafter *where it is determined that the type of governmental immunity involved is no longer entitled* to immunity. It would be impractical to fix one effective date for abolition

of governmental immunity for schools and different dates for other municipal or quasi-municipal corporations *which may be found no longer entitled* to defend on the ground of immunity." (Emphasis added.)

4. Petitioner Has Not Shown That the Intervention of This Court Is Necessary to the Fulfillment of Its Constitutional Duty.

Petitioners have shown no instance under Illinois law wherein parties in the same or similar circumstances as they have received a different treatment than has been accorded to them. On the contrary, in all cases which have arisen, the Illinois Supreme Court has consistently ruled that no cause of action existed with respect to alleged claims against governmental bodies where said alleged injuries occurred prior to the date of December 16, 1959. *List* v. *O'Connor*, 19 Ill. 2d 337 (1960); *Peters* v. *Bellwood*, 19 Ill. 2d 367 (1960).

II.

THE SUBSTANCE OF PLAINTIFFS' PETITION IS WITHOUT MERIT.

The Petition is premised upon two erroneous assumptions.

First, that the decision of the Illinois Supreme Court in the *Molitor* cases created a remedy in the Petitioners and that the present decision unconstitutionally deprived them of that remedy thereby denying them due process and equal protection of the law.

There is no doubt the Supreme Court of Illinois could have made wholly prospective its decision in the *Molitor* cases and have denied recovery to the children there involved. *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932).

The Court elected to apply its new rule to *Thomas Molitor*

to avoid the objections of dictum and lack of incentive for challenging precedent. It also applied the new rule to the other children involved in the same school bus mishap when it discovered that the *Thomas Molitor* case was representative of all their claims. It made its decision prospective respecting all other claimants to avoid hardship which might result to governmental bodies from their reliance on precedent in failing to investigate injuries occasioned in the carrying out of their governmental functions and the consequent inability to properly protect their legitimate interests. In the *Molitor* cases the Illinois Supreme Court sought to overturn the doctrine of governmental immunity and to do so with as little dislocation of legal rights and defenses as possible to all parties affected thereby.

It is conceivable that in allowing recovery to the *Molitor* plaintiffs the Illinois Supreme Court might have been in error and that in consequence thereof the *Molitor* plaintiffs benefited thereby. It does not, however, follow that the Petitioners can predicate a right upon such possible error and seek the aid of this Court in imposing upon the State of Illinois a rule of law inconsistent with its right to determine its own organic law and thereby foreclose to the State the opportunity to correct such error.

As pointed out by Chief Justice Vinson of this Court in his address before the American Bar Association, September 7, 1949, it has never been the concern of this Court to correct the errors of lower courts. "To remain effective the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved . . ."

Were this Court to grant the Writ here sought it could only be to consider the validity of the action of Illinois Supreme Court in allowing its prospective overruling of

the doctrine of governmental immunity to be applied to the parties whose claims were the subject of the litigation in which the doctrine was overruled. The validity of that action is not a proper subject of this Petition.

Second: petitioners' other erroneous assumption is that they had a vested right to a cause of action against the Forest Preserve District of which they were unconstitutionally deprived by the retroactive language of the Statute.

Petitioners admit (Petition, p. 3) that the doctrine of governmental immunity was the law of Illinois at the time of the alleged injuries sustained by them. It is clear under Illinois law, *List v. O'Connor*, 19 Ill. 2d 337 (1960), that no cause of action existed at the time of the alleged injuries. If a cause of action existed it could only arise by statute or by decision, *Roumbos v. City of Chicago*, 332 Ill. 70, 78 (1928). There is no statute creating a cause of action for tort, nor are there any cases creating such a cause of action against Forest Preserve Districts and since the so-called "Immunity" Statute was passed prior to the effective date of the *Molitor* decision overruling the pre-existing rule of immunity as to School Districts, the statute clearly does not present any constitutional question for this Court's consideration.

CONCLUSION.

It is respectfully submitted that for the foregoing
sons this case is not a proper one for review by certio
in this Court, and that the Petition for a writ of certi
should be denied.

Respectfully submitted.

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